



POLICE DEPARTMENT

August 31, 2010

MEMORANDUM FOR: Police Commissioner

Re: Detective Marc Lotter  
Tax Registry No. 902657  
Police Laboratory  
Disciplinary Case No. 85444/09  
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The above-named member of the Department appeared before me on June 30, 2010, charged with the following:

1. Said Detective Marc Lotter, while assigned to the Forensic Investigations Division, Firearms Analysis Section, on March 5, 2008, while off-duty, did engage in conduct prejudicial to the good order, efficiency, or discipline of the Department, to wit: said Detective, transmitted an electronic message to Karen Castro, threatening to physically assault Ms. Castro's boyfriend, causing Ms. Castro annoyance and alarm.

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS

The Department was represented by Vivian Joo, Esq., Department Advocate's Office, and the Respondent was represented by Peter Brill, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Not Guilty.

COURTESY • PROFESSIONALISM • RESPECT

SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department called Karen Castro as its sole witness

Karen Castro

Karen Castro currently lives in [REDACTED] in [REDACTED] County. She works as a claims adjuster for Liberty Mutual Company, evaluating litigated injury claims for motor vehicle accidents. She is not currently married, although she was married to the Respondent for about 15 years. They were divorced in 2006 and have three children together, [REDACTED], [REDACTED], [REDACTED], and [REDACTED]. As of the time of this hearing, the Respondent has custody. Castro sees the children every other weekend, from Friday to Monday morning, Tuesday evenings to Wednesday morning and Thursday evenings, as well as half of the summer and half of the vacations.

Castro described her relationship with the Respondent after the divorce as, "very uncivil and difficult, non communicative, hostile." For the past year or two they have communicated by e-mail only and they do not talk on the phone. When asked how the Respondent refers to her in his e-mails, Castro said that he must have her in his address book as, 'lying cheater,' because that comes up every time she gets an e-mail from him. The Respondent has called her, "unfit, he's called me a liar, a cheater, a whore, he's called me a worthless person, a worthless mother."

Castro testified that on March 5, 2008, at approximately 9:09 a.m., she received an e-mail from the Respondent while she was at work. The e-mail was received in

evidence as Department Exhibit (DX) 1 and appears as follows <sup>1</sup>

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Wed Mar 5, 2008 at 4:35 AM

To lying cheater [REDACTED]com>

Let me explain to you as simply as I can. If your midget, tough guy boyfriends ever acts like that to one of my children again, there are not enough cops in the world that will be able to stop me from giving him a good old fashioned ass kicking. If he ever approaches, my children, me or my vehicle again in the ranting, and uncontrollable way he did last night I will stop my vehicle and do something he is going to be sorry of, I will protect myself and my children. I will not just drive away again. He is going to have a hard time explaining to the Judge who he stated to, "I am afraid of Marc Lotter," when he is the aggressor, and chasing me. So let this serve as a warning, not a threat. Just because he is too much of a pussy to pick up his own children, let him know that I will not be afraid of him.

As for your actions, I am glad to report that [REDACTED] says you stuck up for her, for once to that little chihuahua. That is definitely a step in the right direction. The problem is you rarely take more than one step forward and usually take 4 steps backwards. Now let us see how you handle the rest of this situation. [REDACTED] said she has no problem seeing you, and as long as it doesn't interfere with our plans I will not stop her from seeing you, (I never have) but she refuses to be around, that piece of crap, you are living with. So I strongly suggest you don't force her to be around that cookoo bird, and make other arrangements with her. I would hate for you to lose her a second time because of "A MAN" hahahaha.

I am sue you will not respond to this so I will not hold my breathe

God Bless Our Troops  
Marc Lotter

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Castro said she first saw that e-mail when she was in her office, and that it was sent at 4 35 a m on March 5, 2008, from '[REDACTED]' (the Respondent's e-mail address) to 'lying cheat [REDACTED]' (Castro's e-mail address)

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<sup>1</sup> Because this e-mail is the subject of this case it is set forth here in its entirety and as close in appearance to the original as is possible

Castro said that she was living with her boyfriend [REDACTED] at the time and that her children were there with her the night before that e-mail was sent. Her older daughter wanted to go to her father's house, so she had called him and he offered to pick her up. Castro said she suggested that she would drive her home, but her daughter responded that her father was already coming. Her boyfriend, who had a very unfriendly relationship with the Respondent, did not want him to come to the house. It was an extremely narrow street and the Respondent's vehicle was a suburban, so he would have to turn around in the driveway. Her boyfriend did not want him to do that, so he asked her daughter if she could walk to the end of the block. She was 15 or 16 at the time. Castro said she asked her if she would and she said yes, but her father told her not to.

Castro said that the Respondent came to pick up [REDACTED] and there were some words exchanged outside between her boyfriend and the Respondent. She was in the house with the younger children at the time. Castro reiterated that she was living with her boyfriend at the time and that it was a Tuesday evening, so she had custody of them until Wednesday morning, when she would take them to school. She did not remember why exactly [REDACTED] left early but said that she thinks [REDACTED] was uncomfortable staying that night. They had recently moved in and things were not really situated in the house and she wanted to leave. Castro stated that she is no longer with her boyfriend from that time, [REDACTED]. She said she believed [REDACTED] was 16 years old at the time of the incident and she is 18 years old now.

Castro said that after she read the e-mail at work the next morning she felt very scared, upset and worried that something would happen. She felt the Respondent would carry out his threat. She was scared because she knows the Respondent and knows that

he has a very bad temper and would do exactly what he said he would do. She asked her supervisor if she could leave work and she went to the [REDACTED] Police Department to show them the email. The Respondent was not arrested as a result of this.

On cross-examination, Castro stated that the divorce from the Respondent was finalized in approximately June 2006. She stated that the Respondent was awarded custody of the children in October 2005, after a Supreme Court trial for both custody and divorce. At the time, Castro and her daughter [REDACTED] did not have a good relationship. The judge cited facts that siblings should be together as much as possible and so based on that information, the Respondent was awarded custody. There was also a separate Family Court incident where she made allegations against the Respondent. She did not remember what those allegations were, as it was back in 2004, or if there were findings in the Family Court matter, that the Respondent had not committed any sort of family offense. When asked, Castro recalled alleging in Family Court that the Respondent had threatened and assaulted her. There was a trial in Family Court because she had received a temporary order of protection and that at the end of the trial, the judge declined to give her a permanent order of protection. She did not recall if the Family Court judge also made findings that her testimony in that proceeding was not credible.

Castro stated that she did not make additional allegations against the Respondent, stating that he had molested a five year old child. Those allegations were in fact made by [REDACTED], her boyfriend at the time, about his own child. Those allegations were made prior to the divorce proceeding. Castro did not know what became of those allegations, nor did she know whether or not the Respondent has ever been arrested for any sort of child molestation. To her knowledge, the answer is no.

Castro reiterated that the Respondent in his e-mails has called her unfit, but said that those were not the findings of the Supreme Court judge. She said that the Supreme Court judge made a determination that she was not the parent who should have permanent custody of the children. She also stated that the Respondent had called her a cheater in those e-mails.

When asked if it would be fair to say that the Respondent's e-mails are not the only e-mails that are nasty in their exchanges, Castro said that she was not sure that she would say that. She would have to say that his are very nasty and sometimes after numerous attempts to resolve things nicely, sometimes the ones coming from her side are not so nice. Castro reiterated that the Respondent and [REDACTED] did not have a good relationship around March 2008 and that the relationship between [REDACTED] and her daughter was civil, difficult, but not bad. By that time, in 2008, Castro's own relationship with [REDACTED] was very good.

Castro stated that she thinks she was the one who asked [REDACTED] to wait for the Respondent to pick her up down the block, which was about three houses down. She said that it was at approximately eight o'clock at night and she asked [REDACTED] to have the Respondent call her when he was on his way, so that she could meet him there. As of 2008, her communication with the Respondent was predominantly through e-mail, but there were maybe one or two phone calls. She did not personally at this time pick up the phone and find out how far away the Respondent was, but specifically remembered asking to [REDACTED] find out, before she went outside. Castro said that [REDACTED] responded that he would call her but he was insisting on picking her up at the house. When asked if it was cold that night, Castro said she was sure that it was not too cold or she would not

have suggested that he daughter walk down the block. She said that it certainly was not below 30 or 40 degrees and it might have even been a warm night. "I would have never asked her to walk down the block if it was too cold to walk." Castro did not have a specific recollection, at the time of this hearing, as to what the temperature was that night.

Castro testified that she saw the Respondent's car drive down the block and that [REDACTED], who was already outside somewhere, went out to the car. She did not see any interaction between [REDACTED] and the Respondent. She did not check the time when the Respondent came down the block. She also did not recall how long the time was between when [REDACTED] went outside and when the Respondent arrived.

Having reviewed the e-mail in evidence, Castro said that she felt threatened. When asked if there were any actual threats in that e-mail, she stated that she did not now know what was meant by actual threats. She was then asked if she felt threatened because the Respondent said he is going to do something to her, she said, "Well, the threat is threatening, the tone is threatening, the discussion about my daughter is threatening." She said that the Respondent was obviously extremely angry and that to her, someone who is very angry sending an angry e-mail is threatening. She said that she felt that the email was threatening to her, threatening to [REDACTED] and threatening to her daughter. When asked if he actually threatened her or her daughter in the e-mail, Castro clarified that, "He does threaten our relationship if he isn't, you know if I don't do certain things you know, it's not going to be good for my relationship."

Castro was asked if she knew what the Respondent was referring to when he said, "if your boyfriend ever acts like that to one of my children again," and she said that she did not know what happened outside as she was not there, but that she did know

something had happened the night before. When asked if she agreed that the second part of the sentence, the "ass kicking," is contingent on the first part of the sentence, "if he ever does this again," she responded that the Respondent was putting the onus on her, writing about her boyfriend as if she has some control over his actions and saying that if she does not stop him from doing something like this again then something terrible is going to happen. Castro did not think that she was reading into this sentence because even though the Respondent did not say that she needs to do something or something terrible will happen, just that if [REDACTED] does something then he will beat him up. Still, the e-mail was sent to her and not Lutrario. Castro said she knew that the Respondent had [REDACTED]'s e-mail address because there were messages sent back and forth between [REDACTED] ([REDACTED] ex-wife and the Respondent's girlfriend) [REDACTED], and the Respondent.

Castro acknowledged that the third sentence of the e-mail again began with an, "If," i.e., if he ever approaches my children. I will do something he is going to be sorry about and that this is a contingent threat. She also acknowledged the sentence that specifically says let this serve as a warning and not a threat, but said that she perceived it in the opposite way anyway, based on the tone and what he says.

Castro reiterated her assertion that the Respondent was threatening her relationship with her daughter. She said that even though it says in the e-mail, that the Respondent was glad to report that [REDACTED] had told him that she had stuck up for her for once and that this was definitely a step in the right direction, that she perceived the next two or three lines as a threat. In the e-mail, the Respondent went on to say that "the problem is you rarely take more than one step forward and usually take four steps



backwards. Now let us see how you handle the rest of this situation. [REDACTED] says she has no problem seeing you as long, as it doesn't interfere with her plans. I will not stop her from seeing you, I never have, but she refuses to be around that piece of crap." Castro said that the Respondent was being sarcastic because he had stopped her daughter from seeing her. She stated that she can read the sarcasm in his e-mail because she knows him and she knows her daughter. She has had conversations with her daughter, about his willingness to see them have a good relationship. She said that what the Respondent says and does, are two different things. She acknowledged that when she reads those sentences, she is not just reading them as they are on the page or the screen, but rather she is taking into account her prior interactions with both of them. When asked if it would be fair to say that from the words, "as for your actions" in the e-mail, and going on down there is no threat to her or her daughter or their relationship in plain English. Castro stated that she does not know how to answer that, but that the e-mail made her scared on her own behalf and on the behalf of [REDACTED].

Castro said that she personally took off from work to go to the police department. She did not think that [REDACTED] went with her. She said she was not sure if the police declined to take any action, as they did not discuss their investigation with her. She said she just gave them the information and they were looking into it. To her knowledge, the Respondent was not arrested for anything regarding this e-mail. She said that she believed the [REDACTED] County Police Department told her to report this to the NYPD, which she did.

On re-direct examination, Castro stated that the Respondent was not faithful to her during their marriage and that he is currently married to [REDACTED], [REDACTED].

██████'s former wife

When asked to describe the street that ██████ was asked to walk down and wait for the Respondent, Castro said that it was residential, very small and narrow. She also said it was a dead end and very safe. She said that she did not perceive any dangerous conditions in having ██████ walk down the block and wait for the Respondent to pick her up. She thought that the Respondent and ██████ might have words and wanted to protect her from anything that was said. ██████ is the oldest of Castro's three children.

Castro recalled having been asked about certain statements in the e-mail being contingent, because of the fact, that if someone does something he will do something. She stated that she interpreted the e-mail as meaning, if she does not do something about this then, this is going to happen and that is he is going to do these things. She said that she did not know what she could do and she does not have control over other people. So she did not know what it was that she could do, to prevent this from happening and that if there was nothing to prevent it, then it was going to happen.

#### The Respondent's Case

The Respondent testified on his own behalf.

#### The Respondent

The Respondent, an 18 year veteran of the NYPD, is a detective in the Firearms Analysis Section (FAS), where he has been assigned for approximately three years. At FAS he is an examiner for firearms ammunition, checking for identification and operability. Prior to that he was in Brooklyn North Narcotics for nine years, which is

where he received his Detective shield. He has received a few Excellent Police Duty awards and some Meritorious Police Duty awards over the course of his career and he has never been the subject of prior charges and specifications. Outside of the Police Department, he is in the US Navy Reserves, where his title is Master Arms First Class. In that position, he trains his unit in the use of firearms such as M16's, 9 millimeters, machine guns, shot guns and cruiser weapons. He also trains them in all of the qualifications and maintenance of the weapons. He has been doing that for approximately eight years.

The Respondent said that he was married to Castro for 15 or 16 years, from 1987 until June of 2006. They started off their marriage living in Germany because the Respondent was in the Air Force. From Germany they moved to Texas and then back to [REDACTED] in [REDACTED] County, New York. The Respondent has lived there for about twenty years, having stayed after the divorce. The Respondent said that he has three children and is currently married to [REDACTED], who was formally married to [REDACTED].

The Respondent stated that what led to his divorce was him catching Castro having an affair with his next door neighbor, [REDACTED]. When he approached her about it, "she pretty much told me in unspecific terms, we are getting a divorce. This is New York State, I am getting everything and if you don't give me everything, I will wreak havoc through your job, with a couple of profanities laced in there." He said that Castro made false allegations about him in Family Court, "I lost track probably about 100 times now." He said that there was an initial allegation against him that caused him some work related consequences. When he approached Castro about her affair she went to court and got an order of protection claiming that he physically and mentally abused her, that he had been

beating her up for years, that he was an alcoholic and that he was violent. He said she, "Pretty much said everything that there was to say." That order of protection was granted in his absence. The Respondent said that he was served at work and as a result of that initial temporary order of protection being served, he lost his firearms and shield for approximately two years.

The Respondent said that he got them back after a Supreme Court trial in which he got custody of his children. He had to face psychological evaluations and go to alcohol and marriage counseling. He said that, "the Department forced me to go through all this training that I was never convicted, never did."

The Respondent said that there were two separate trials, the original Family Court allegations trial and the Supreme Court divorce trial. In Family Court the judge, "pretty much said her testimony was unbelievable [sic] without a doubt and there was no substantiating anything she said." At that point the order of protection was vacated and he was allowed back into his residence. During that time he was served with divorce papers. After the trial in Supreme Court, he was granted full custody of his children based upon her testimony again. He said that, "a judge cited her perjury and willingness to wreak havoc through his job instead of using the court proceedings and that she was an unfit mother." The Respondent said that there were times throughout these proceedings that his wife made complaints to the Police Department, in his view, to influence the divorce proceedings.

The Respondent has never been arrested for any allegations involving the divorce proceedings, the Family Court proceeding or for anything having to do with this situation. Castro was arrested for an incident where she attacked him in public and as a

result of the arrest, the Respondent was granted an order of protection by [REDACTED] County. Castro was arrested again for violating the order of protection, when she called him at work and demanded an additional \$600, or else she was going to call his job and make more complaints and take him to court again. The Respondent complained because she made contact with him and she was trying to extort money from him. As a result of this, she was arrested. He believes that the judge gave her an ACD and that is when he renewed his order of protection for a second year. He said that he believed the first incident occurred during the divorce proceedings, while the second incident was after it was finalized. The order of protection, a stay away order, expired in February of 2008.

The Respondent said that after the order of expiration expired in 2008, Castro started getting bolder and contacting him more often, getting more aggressive with her demands and things of that nature. The Respondent said that he avoids [REDACTED] despite the fact that their kids play in the same leagues. He has never had any confrontations with him, from the time the divorce started until the time of this hearing.

The Respondent stated that he knew what led up to [REDACTED] leaving the house on the evening of March 5, 2008, because [REDACTED] had told him. She called him at work all upset and asked him to come pick her up. When he asked what was wrong, she said that he should come right now and she would tell him later. The Respondent told her that he would come pick her up at the house and then, "She said no, [REDACTED] told me to get the hell out of the house and wait on the corner. So I will be on the corner." The Respondent told her that it was too cold out, too late at night and that the street they live on is very dark, so she should stay by the house. He told her that it would take him approximately an hour to get there from work.

The Respondent said that when he got there, [REDACTED] was waiting in a sort of unheated mud room. It was approximately 40 degrees out that night and she had been standing out there for an hour. She got into the car and [REDACTED] o, "started running at me with his cell phone by his ear and just chasing me down the block, as I was backing up the block to turn around. My truck is too big to make a U turn and I wasn't going to pull into his driveway and turn around, so I was backing into another driveway, he came right up to my window, started screaming at me, my window was up and I just drove away."

The Respondent did not recall what [REDACTED] was saying. He said that he just heard mumbling and was not really paying attention, as he just wanted to get out of there.

The Respondent said that before he sent the e-mail that night he asked [REDACTED] what had happened. She said that [REDACTED] approached her in the house and told her that she was a bad influence on his children. He told her to "get the hell out of my house, you are not welcome here." The Respondent stated that [REDACTED] said she told her mother and her mother's response was that it is his house and she needs to do what he says, at which point she left and called her father.

The Respondent was shown DX 1 and he recognized it as the e-mail that he had sent at approximately 4:30 in the morning on March 5<sup>th</sup>, 2008. He said that as a father with children and being limited by his job, as to what he could and could not do, he had actually written a nastier e-mail that he saved to his drafts and did not send. He went to sleep and when he woke up and still had it on his mind, he revised it to what it is now, making sure to get his point across that he was very upset about the incident of the night before and the threatening manner in which he was approached by [REDACTED] when he was just there to pick up his child.

The Respondent said that in his mind he did not make any threats to anyone in the e-mail and he specifically said that this was not a threat. He acknowledged that there were suggestions in the e-mail that if certain things happen there would be violence, but he testified that there was no intent to carry out what he was talking about and that it was just him blowing off steam. He said that if he ever had any intentions of inflicting violence upon [REDACTED] there were many other reasons why he would have. He said that he was accused of many things that he could have taken action on, but did not, because when he thought about it later, it was not worth it to his children to do anything like that. He reiterated that it was him blowing hot air, but said that sometimes you have to stand your ground to make your point known.

When asked about the other things he has been accused of, the Respondent said that [REDACTED] had accused him of molesting his five year old son. The [REDACTED] County police told [REDACTED] that after interviewing his son, they thought that nothing happened and so he went to child welfare. They also investigated and found that the Respondent had done nothing wrong. He then went to the judge in his divorce and demanded that something be done and the judge said that there was nothing going on.

The Respondent reiterated that he did not threaten Castro at all in the e-mail. He said that in this writing he never threatened nor did he have any intention to disrupt the relationship between Castro and his daughter [REDACTED]. He continued to abide by any court ordered visitation during this time period and since then he has never withheld visitation from Castro. The Respondent said that he encouraged [REDACTED] to continue seeing her mother.

When asked about the tone of the emails that he received from Castro around the

same time period, the Respondent stated that, "it's usually about the children and she will just make things like very snobby in a way like she has an alternate - I am sorry, that she had another agenda. That is another reason why she will say things like my son [REDACTED] got a 54 on his test, if you can't raise our children I will have to take you to court, it's always something threatening or a perceived threat like she knows that she is going to take that to court one day." The Respondent said that whenever it is something about the children he mostly talks to his Castro through e-mail. Primarily, because she has continuously told the police that whenever they talk he threatens her and he cannot tape every conversation. The Respondent said that the tone of the e-mail in evidence is not the normal tone of his e-mails with her and that normally he just tells her whether the kids have games or appointments, etc. He tries not to have too much conversation with her. He said that things have improved somewhat since [REDACTED] is no longer in the picture, but "it's more of she has an agenda now that she doesn't have a boyfriend to distract her. It's more I am getting my kids back and threatening to go to court all the time."

On cross examination the Respondent reiterated that he knew that his wife was having an affair and that [REDACTED] made allegations against him to the police. The Respondent said that he had no relationship with [REDACTED] not that it is fair to say that he does not like him. He acknowledged that the divorce from Castro was a bitter one and said that he does not think about her. He said that it was his view that Castro brought allegations in Family Court because she was trying to influence the divorce proceedings. The Respondent said that he brought allegations against her as well, some of which were dismissed, but he said that he never made the allegation that she made.



The Respondent reiterated that the e-mail in DX 1, was not an e-mail that he normally sends, in that it was more aggressive than most. He did not recall having called her a, "pathetic piece of shit," or a "lying whore," or a "pathetic worthless excuse of a mom," in previous emails, nor did he recall telling her to "go fuck yourself and your midget boyfriend." The Respondent reiterated that Castro explicitly has another agenda when she e-mails him and that depending on the e-mail he perceives them as threats. When asked if he threatens her in e-mails all the time, the Respondent said, "I don't threaten all the time in e-mails, I don't know."

The Respondent affirmed that on direct testimony he said something to the effect, that Castro goes to the court every single time and makes false allegations against him to get back at him. He said that he makes allegations when they occur.

The Respondent did not remember stating, in regards to an email about his son [REDACTED] that Castro could take the e-mail to her lawyer and promise him sexual favors to take him (the Respondent) to court and spend all the money she likes. He did remember an incident where his daughter [REDACTED]'s book was not with her when Castro dropped her off after visitation. He did not recall sending an e-mail stating that if the book was not brought home by the children on Wednesday, December 5, 2007, that he would take a copy of this e-mail to the library, to the 3 Precinct and to the [REDACTED] County DA and will not leave until she is arrested, and that he (the Respondent) did not even want to see her "sorry ass" again but if he has to for the children then she should not push him unless she really enjoys jail.

The Respondent confirmed that his e-mail address is [REDACTED]@[REDACTED].com and he was shown the e-mails in question. He confirmed that those comments were in

there but he still did not recall saying that

The Respondent confirmed that on direct testimony he had said that sometimes you have to stand your ground to make a point. He said that the point he made in this e-mail was not that he was going to give [REDACTED] a good old fashioned ass kicking but that he was angry about how [REDACTED] had treated his daughter. The Respondent said that he was angry when he wrote the e-mail. He said he believes that he was at his house when he wrote it and that he was not working at that time of morning. When asked if he thought it is fair to say that giving a, "good old fashioned ass kicking" is a threat, the Respondent stated that he thinks if you use the first part of the sentence, where it says "if he acts," then it is defending yourself and not a threat.

When asked if he meant every word in that e-mail, the Respondent said that, "would I kick [REDACTED] ass to defend my children. Yes, I would, if that is your question."

The Respondent said that he has been a member of the service for approximately 18 years, he has been in the Navy for eight years and he spent four years in the Air Force. He said that he has been trained to deal with tough situations. The Respondent stated that he did not allege that Castro assaulted him. He said that he believed all of the responding officers were from the 3rd Precinct and he acknowledged that he knew two of them. One of whom he had worked with at the 83 Precinct and the other one who he knew socially.

The Respondent was asked about the order of protection where the case was adjourned in contemplation of dismissal. That order indicated no phone contact and the Respondent called the police because Castro had contacted him on the phone. The Respondent stated that she threatened him, tried to extort money from him and said that if

he did not give her \$600 she was going to court. The Respondent acknowledged that the conversation was really about whether it was Castro's turn to claim their children on the tax return. He stated that it was not fair to say, that he also called the police against her at every opportunity.

### FINDINGS AND ANALYSIS

The facts of this case are as simple as they are unfortunate. The Respondent and Castro had been married for 15 years. They have three children. They are now divorced and there are ongoing problems, particularly in regard to Castro's boyfriend, [REDACTED]. The Respondent specifically has problems with the relationship of that boyfriend to his children.

After some interaction with Castro's boyfriend related to the care of their children, the Respondent went home and sent Castro the e-mail which is the subject of this charge.

There is no question that the language of e-mail in question is unfortunate and foolish. The question is whether it is actionable misconduct.

The sole specification alleges that the Respondent, "transmitted an electronic message to Karen Castro, threatening to physically assault Ms. Castro's boyfriend, causing Ms. Castro annoyance and alarm."

Although wiser and more temperate language would have been appropriate, a fair reading of the e-mail is that the Respondent did not actually threaten the boyfriend. The e-mail is addressed to the boyfriend's conduct. Moreover, the Respondent specifically stated in the e-mail that, "this is not a threat."

As to that aspect of the charge that seems to mirror the penal law, it too does not state a cause of action. The crime of aggravated harassment requires that the person sending the message act with intent to harass, annoy, threaten or alarm. Reading the e-mail in this case, it is reasonably clear that the purpose of the message was not to do that but to communicate displeasure at the conduct of the boyfriend.

The Department, citing People v. Shack 86 NY2d 529, asserts that not all speech is protected and that, "a person's right to free expression may be curtailed upon a showing that *substantial privacy interests are being invaded in an essentially intolerable manner*, (emphasis added). Another case relied on by the Department People v. Little 14 Misc 3d 830 (Appellate Term 2d Department, citing one of own earlier cases, People v. Goldstein, 196 Misc. 2d at 746-747), noted that the aggravated harassment statute "was facially limited to proscribing conduct and '*exclude[d] from the statute's ambit speech which is merely unpleasant to the recipient*,'" (emphasis added).

It merits note, that the Court of Appeals, in a later portion of the Shack opinion, explained that the constitutionality of the aggravated harassment statute is grounded in the fact that it requires criminal intent.

What these cases, in essence tell us, is that the wall around protected speech can be breached but that it is a high wall none-the-less and that it can only be breached with extraordinary conduct. Additionally to breach the wall of free speech protection the conduct must be launched with criminal intent.

It should also be noted that the underlying conduct in the Shack and Little cases is serious, egregious and distinguishable from that in the instant case. In Shack there were a number of phone calls made after the defendant was repeatedly told not to call. There

were also numerous unequivocal threats of violence and further harassment. In Little there were numerous phone calls and repeated, unequivocal threats to the recipient of the calls.

In reversing a conviction under the aggravated harassment statute, the Appellate Term First Department, set a standard that can be applied to this case. "In determining whether defendant violated the telephone harassment statute, our task is not to decide whether defendant acted inappropriately in calling the complainant in the emotionally charged circumstances then prevailing or to pass judgment on whether defendant's statements were indecorous or indiscreet. Rather, the core issue before us is whether defendant's isolated telephone call was shown beyond a reasonable doubt to have been actuated by the requisite criminal intent -- viz., to 'harass, annoy, threaten or alarm' -- or to have been initiated in a 'manner likely to cause annoyance or alarm,'" People v Silverberg, 1 Misc 3d 62.

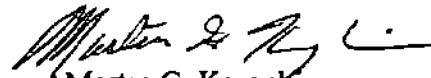
Taking into consideration the rule of law as set down in the Shack, Goldstein and Little decisions and applying the standard found in Silverberg to the current case, it is clear that the Respondent's e-mail message does not violate the penal law.

Certainly the central problem here is that both the Respondent and Castro have ongoing child rearing responsibilities which are complicated by their continued hostility and mutual cross-complaints.

The subject of this e-mail is a family matter and involves off-duty conduct. While the Respondent would have served himself and his children better by writing a clearer and less hostile e-mail message, this is essentially a private matter. There was no

criminal prosecution and that too is a strong indication that the message violated no law  
As such it does not comprise actionable misconduct The Respondent is found Not  
Guilty

Respectfully submitted,



Martin G Karopkin  
Deputy Commissioner – Trials

**APPROVED**  
FEB 01 2011  
  
RAYMOND W. KELLY  
POLICE COMMISSIONER